STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Judges: R Gribbs, P.J., J. Hoekstra, and J. Markey, JJ.

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

MARCEL R. RIDDLE
Defendant-Appellant.

No. 118181

L.C. No. 97-6731-01
COA. No. 212111

APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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Summary of Argument

The Michigan legislature has not defined the "term" murder used in the murder statutes, but instead has employed a common-law term. In so doing, the legislature enacted the common-law meaning of the term just as if it had spelled out that meaning in detail. The question is the meaning of the term at common-law.

At common-law–and as adopted into the murder statutes–there were a number of justification defenses, including self-defense, or *se defendendo*, defense of the habitation, and resistance of a violent or forcible felony. The latter two privileged the use of deadly force without retreat and without regard to a fear of imminent death or great bodily harm; the former required retreat "to the wall" before deadly force could be employed, so long as retreat could be undertaken in safety, with the exception of assaults occurring in the dwelling. This "castle exception" permitted the use of deadly force without retreat, even if retreat was possible in safety, from the dwelling.

The common-law justification of defense of habitation does not include the curtilage. In the United States, divergent views grew up regarding retreat in self-defense. Michigan maintains the common-law rule that retreat is necessary if it can be undertaken in safety before deadly force may be used. Consistent with the expression of the sanctity of life that Michigan has embraced, the rule of retreat should be viewed as a retreat to the structure, and not simply the grounds surrounding the structure, especially given that the ancient concept of curtilage–a walled or fortified enclosure, so built for the very purpose of defense–no longer obtains in modern society.

COUNTERSTATEMENT OF THE QUESTION

I.

The common-law principle of *se defendendo* required "retreat to the wall" before deadly force could be employed, so long as retreat could be undertaken in complete safety, out of a concern for the importance of human life. The common-law rule excepted assaults occurring in one's dwelling from the rule of retreat. Should this "castle exception" be viewed as including the "curtilage" or "yard" of the individual claiming self-defense?

Defendant answers: "YES"

The People answer: "NO"

COUNTERSTATEMENT OF FACTS

The People accept defendant's statement of the facts for purposes of this appeal, with the exception of all conclusions. The People would also add that on direct-examination the defendant stated that "I reached in the garage, and what not, when he reached like this here and I thought he had a gun and what not and I pulled my Carbine and what not and I aimed it, you know, at his legs." 100a. It was not until cross-examination that defendant testified that he saw a "dark object" in the victim's hand. 108a, 113a. The defendant also testified that he had not known the victim to carry a gun before that day because "I didn't know Robin that long to know, you know, much about his background." 100a-101a..

ARGUMENT

I.

The common-law principle of *se defendendo* required "retreat to the wall" before deadly force could be employed, so long as retreat could be undertaken in complete safety, out of a concern for the importance of human life. The common-law rule excepted assaults occurring in one's dwelling from the rule of retreat. This "castle exception" should not be viewed as including the "curtilage" or "yard" of the individual claiming self-defense.

Standard of Review: Withdrawn Instructional Requests

There is no quarrel here that the circumstances under which a "no retreat" self-defense instruction is required is a matter of law, so that, where properly preserved, the refusal to give a no-retreat instruction is reviewed *de novo*.[1] But the People do dispute the matter of preservation of the claim; defendant argues that the issue is preserved, and the Court of Appeals agreed. The Court of Appeals found the issue preserved because, though defense counsel "did offer to withdraw the request for the no duty to retreat instruction," the trial judge ruled on it nonetheless.[2] The People do not understand how a ruling that a party is not entitled to an instruction the party is *not* seeking–is expressly disclaiming, approving of the instructions as is–preserves the issue of the necessity of the instruction.

Defense counsel *did* request the instruction, but the prosecutor objected, pointing out that "the notes in that particular instruction indicate that self-defense that occurs on the curtilage outside

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[1] *People* v *Carpentier*, 446 Mich 19 (1994); *Cardinal Mooney High School* v *Michigan High School Athletic Ass'n*, 437 Mich 75, 80 (1991).

[2] Slip opinion, at 1, fn 1.

of the, the house, the dwelling is not, does not include the home,"[3] the reference being to CJI2d 7:17. Defense counsel responded: *"Judge, we'll withdraw it. We'll withdraw the request and* ***we're ready to proceed.***"[4] The trial judge determined to rule in any event, holding that based on the comments and notes on use for CJI2d 7.17 the instruction on no duty to retreat was inappropriate. Though the trial judge ruled, perhaps out of a sense of thoroughness since the matter had been raised, he was no longer ruling on defense counsel's request, that request having been *withdrawn.*[5] The issue is *not* preserved, and the claim is either waived or forfeited. Given the statement "we'll withdraw the request and we're ready to proceed," indicating satisfaction with the instructions as discussed,[6] the instructional claim has been waived under this court's decision in *People v Carter*,[7] so that there is no "error" to review. At the least, the claim is forfeited, and review should only be for a miscarriage of justice under the plain-error standard.[8] That standard cannot be met, for though, as will be

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[3] IV, 3.

[4] IV, 4.

[5] See *People v Dunham*, 220 Mich App 268 (1996); *People v Burgess*, 153 Mich App 715 (1986); *People v Samuelson*, 75 Mich App 228 (1977); *Strach v St. John Hospital Corp.*, 160 Mich App 251 (1987).

[6] Withdrawal of the request is quite understandable given 1)the state of the law currently, as pointed out by the trial prosecutor, with regard to retreat and the "curtilage," and 2)that in a case involving a firearm, the retreat instruction is essentially beside the point, for jurors understand that one cannot outrun a bullet, and the only actual issue is whether the defendant had an honest and reasonable belief that the victim was reaching for a firearm. The People will return to this point.

[7] *People v Carter*, 462 Mich 206 (2000).

[8] *People v Carines*, 460 Mich 750 (1999).

argued, there was no error at all here, even if error is found, no standard of prejudice–be it plain error or harmless error–can be met in this case.

Discussion

A. The Task: to "Clarify What Was Previously Obscure and to Call Things by Their Right Names"[9]

This court in its grant of leave directed the parties to address "the various different possible zones in which courts have found, or commentators have argued, that there should be no duty to retreat and the parties shall argue the merits and demerits of each approach."[10] Examination of this material may well shed light on this case, but it is important to remember that the inquiry here is not a free-floating one regarding the "appropriate" rule as a matter of preferred public policy, but one of statutory construction–determining the circumstances under which a homicide is justified or excused, and so not criminal–and thus a limited, though very difficult, one.[11] This is so because the power to define crimes and ordain punishments is a legislative function, and all crimes in Michigan are statutory.[12] As Justice Campbell stated long ago, "[w]hatever elasticity there may be in civil matters,

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[9] See *Awtry v United States*, 684 F2d 996 (Ct Cl, 1982).

[10] Order of 10-3-2001.

[11] The statute construed here is MCL 750.317, but the term "murder" is also used in MCL 750.316.

[12] As stated by Justice Campbell in *In re Lamphere*, 61 Mich 105, 108 (1886): "While we have kept in our statute-books a general statute resorting to the common law for all nonenumerated crimes, there has always been a purpose in our legislation to have the whole ground of criminal law defined, as far as possible, by statute. *There is no crime whatever punishable by our laws except by virtue of a statutory provision*" (emphasis added).

it is a safe and necessary rule that criminal law should not be tampered with except by legislation."[13] Often penal legislation employs terminology with a common-law meaning[14] without elaboration or further definition, and where this is so the "legislature intended no alteration or innovation of the common law not specifically expressed."[15] In this circumstance, once the common-law definition of a term has been determined, then where "the legislature [shows] no disposition to depart from the common-law definition,... it remains,"[16] for the use of a common-law term without alteration is as much an enactment of the meaning of that term into statutory law as if the legislature had spelled out the common-law meaning chapter and verse in the statute.[17]

In understanding and ordering terms with common-law meanings that are imported into statutes by use without alteration, use of authority from other states and the views of commentators may well be extremely helpful. But the task of the court–using these sources as aids–is to discover and follow the legislature's intent as to meaning of the murder statute in Michigan. Here there is no question that the term embraced by the legislature in the murder statutes–murder–is a common-law term. Murder is well-understood as when "a person, of sound memory and discretion, unlawfully

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[13] 61 Mich at 109-110. For a discussion of this entire area see Baughman, "Michigan's 'Uncommon Law' of Homicide," 7 Cooley L Rev 1 (1990).

[14] Such as murder, or manslaughter.

[15] *Wales* v *Lyon*, 2 Mich 276, 283 (1851).

[16] *People* v *Schmitt*, 275 Mich 575 (1936). See also *People* v *Utter*, 217 Mich 74 (1921); *People* v *Potter*, 5 Mich 1 (1858); *Pitcher* v *People*, 16 Mich 42 (1867).

[17] See also *People* v *Couch*, 436 Mich 414 (1990), where the Court noted that in enacting the murder statute with no alteration of the common-law definition the legislature had "adopt(ed) and "embrace(d)" the common-law definition, making it at least "debatable whether this Court still has the authority to change those definitions." 436 Mich at 420.

killeth any reasonable creature in being...., with malice aforethought...."[18] The definition of murder is complicated because it includes, as it were, *negative* elements, for malice is defined as the intent to kill, the intent to do great bodily harm, or wanton and wilful disregard of the likely consequence of death or great bodily harm, and under circumstances that do *not* justify or excuse the killing, or mitigate it to manslaughter.[19] At issue in the present case is the content or meaning of justifiable or excusable killings at the common law, and when that meaning is ascertained, being embodied in the statute, the task of statutory construction has been completed on the point.

The process here is, then, one of *discovery*–not to attempt to change the law that should apply to any particular facts, but to "clarify what was previously obscure and to call things by their right names."[20] There are three common-law doctrines involved in the present case–and embraced by the murder statute by use of the common-law term "murder" without alteration–and several others that are important but not directly involved here. But critical to the inquiry regarding justification or excuse are the doctrines of:

- ***Se defendendo***, or self-defense, including the "castle doctrine";
- ***Resistance of a violent felony***; and

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[18] IV *Blackstone's Commentaries*, 195.

[19] Holmes, *The Common Law*, p. 50-57 (Legal Classics Edition, 1982); *People v Morrin*, 31 Mich App 301 (1971). As explained in *Morrin*, there is in a sense a "presumption of malice" in that justification, excuse, and mitigation do not have to be negatived unless they arise affirmatively in the case.

[20] See, among others, *Roulette v City of Seattle*, 78 F3d 1425, 1426 (CA 9, 1996)(Kozinski, J.): "The first step to wisdom is calling a thing by its right name." This is often stated as a Chinese proverb; see, for example, *Hamm v. Hamm*, 437 S.W.2d 449, 452 (Mo.App. 1969).

- ***Defense of the dwelling.*** [21]

Though in Michigan *Pond v People*[22] refers to these separate and distinct common-law privileges regarding deadly force, the area has not been revisited in depth in over 140 years,[23] and in Michigan, as elsewhere, there has been a tendency to conflate them.[24] These doctrines must be "de-conflated," and reviewed, for a proper understanding of the historical role and place of the retreat rule within common-law privileges of justification and excuse, incorporated into the Michigan murder statutes by use of the common-law term "murder" without alteration.

B. Excusable and Justifiable Homicide at the Common Law

(1) Se defendendo, or self-defense, and retreat

At the common law, homicide in *se defendendo*, or self-defense, was excusable rather than justifiable homicide, release from punishment requiring the king's pardon. Pardon became automatic, and so the importance of any distinction of self-defense as excusable rather than justifiable homicide disappeared.[25] Homicide in the prevention or resistance of any forcible felony,

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[21] Related doctrines are those of use of deadly force to arrest a fleeing felon, and use of deadly force to suppress a riot, but these doctrines are not central here, and will be discussed only in passing.

[22] *Pond* v *People*, 8 Mich 149 (1860).

[23] See opinion of Chief Justice Corrigan, dissenting from the denial of leave in *People v Canales*, 463 Mich 1002 (2001).

[24] There are, for example, no instructions in the Standard Criminal Jury Instructions on defense of the dwelling/habitation, or resistance of a violent felony, though these are distinct defenses from *se defendendo* or self-defense.

[25] 2 Pollock and Maitland, 478-484; IV Blackstone, 184.

in contrast, was always "justifiable by the law of nature; and also by the law of England."[26] Excusable homicide by self-defense, as opposed to justifiable homicide in resistance or prevention of a violent felony, was a killing during a *chance-medley* or sudden affray. It occurred during a sudden encounter–a quarrel, fight, or brawl.[27] As well summarized by one commentator:

> *Se defendendo*...was limited in application to a specific category of cases–those in which the deaths resulted from a sudden brawl, or "chance medley." In the *se defendendo* paradigm,[28] two men would meet, neither with any intention of harming the other. An argument would start, leading to the use of force, and one combatant would kill the other. If the defendant killed during this sudden quarrel without acting in self-defense, he was guilty of manslaughter, not murder. If however, the slayer could show that he killed only because his life was threatened by the other, and he could not retreat or otherwise avoid the use of lethal force, he was allowed the plea of *se defendendo*.[29]

Use of deadly force in self-defense is a separate doctrine from use of deadly force to prevent or resist a violent felony, including a murderous assault, as will be discussed more fully, which results in a finding of justifiable rather than excusable homicide.

Life taken during a sudden quarrel, fight, or brawl was not taken lightly by the common law, and so it was required that the slayer first "should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant, and not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood." As

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[26] IV Blackstone, 180.

[27] IV Blackstone, 184; Garner, *A Dictionary of Modern Legal Usage, 2nd Ed,* 147 (Oxford University Press, 1995);

[28] Indeed, the present case is a "chance-medley" paradigm.

[29] Richard A. Rosen, "On Self-Defense, Imminence, and Women Who Kill Their Batterers," 71 NCL Rev 371, 382-383 (1993).

to the claim that the retreat rule required one to act a coward before using deadly force, Blackstone replied that while as between independent nations to flee from the enemy in time of war is cowardice, "between two fellow subjects the law countenances no such point of honor." The wronged party, *who could flee in safety*, was required to do so, and receive "all the satisfaction he deserves" from the king and his courts, which were the *vindices injuriarium*. Thus, before life could be taken in self-defense *necessity* was the rule, and the slayer was required to "flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault may permit him: for it may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then in his defense may kill his assailant instantly. And this is the doctrine of universal justice, as well as of the municipal law."[30]

Retreat, then, was *never* required unless it could be safely undertaken, but if it could, was *always* required as part of excusable homicide by self-defense–that is, a homicide occurring during *chance-medley* or sudden affray–but retreat was required no further than one's dwelling or "castle," nor at all if the assault occurred in the dwelling.[31] Two reasons are generally given for the "castle doctrine" exception to the rule of necessity before use of deadly force was permitted in the *se defendendo* situation: 1)a person should not be required to face a possible greater danger by

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[30] IV Blackstone, 184-185.

[31] See e.g. *People v Toler*, 9 P3d 341, 347 (Colorado, 2000).

> Under the "retreat to the wall" doctrine, a person is entitled to employ deadly force in self-defense only if the person demonstrated that no reasonable means of escape existed at the time he killed his assailant....Exceptions to the doctrine developed such as the "castle doctrine," which allows a person in his own home to use deadly force in self-defense without first retreating even if a reasonably safe means of escape exists.

retreating than he or she would by remaining inside the home, and 2)no one should be required to be subjected to the indignity of being a "fugitive from his own home."[32] The reach of the castle rule–whether it included the curtilage–will be discussed later.

(2) Resistance to or prevention of a violent or forcible felony, and retreat

The victim of a violent or forcible felony was, at the common law, privileged to use that force necessary, including deadly force, to resist or prevent the crime, with no requirement of any retreat before deadly force was employed. The homicide was justifiable rather than excusable. As put by Professor Perkins, one who is the innocent victim of an assault which was murderous from the beginning has no obligation to retreat, but may stand his ground, and if it reasonably appears necessary to use deadly force, he or she may do so.[33] Blackstone observed that homicide "committed for the prevention of any forcible and atrocious crime, is justifiable by the law of England, as it stood so early as the time of Bracton, and as it is since declared by statute...." But the privilege was limited to "forcible" or violent crimes, and did not reach "any crime unaccompanied with force, as picking of pockets...."[34] The distinction between justifiable homicide to prevent or resist a forcible felony and self-defense, which arises from a chance-medley or sudden affray, is nicely put by Professor Rollins:

> Although the common-law *se defendendo* rules were quite strict, the early rules permitting a defense based on felony prevention were far

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[32] See Beale, "Retreat from a Murderous Assault," 16 Harv L Rev 567, 580 (1903); Stuart Green, "Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles," 1999 U Ill L Rev 1 (1999); *People v Tomlins*, 107 NE 496, 497 (NY, 1914 (Cardozo).

[33] Perkins, *Criminal Law*, p. 998.

[34] IV Blackstone, at 180.

> more lenient. Not only was there no requirement of imminent danger to life and limb, but the killing need not even have been committed to save a life. The defendant need only show that it was necessary to kill to prevent the felony or to effectuate an arrest or a capture of the felon. The slayer did not have to retreat.[35]

And *Pond*, to which the argument will return, itself declares the common-law rule that it is the "duty of every man who sees a felony attempted by violence, to prevent it if possible, and in the performance of this duty, which is an active one, there is a legal right to use all means to make the resistance effectual," and "the person resisting is not obliged to retreat...."[36] This "no retreat" rule–the right to stand one's ground and resist a violent felony with deadly force–has come to be conflated, at least in some jurisdictions, with the castle rule of self-defense (*se defendendo*).

(3) <u>Defense of habitation or dwelling, and retreat</u>

The defense of habitation privilege–the homicide is justifiable, and not merely excusable–developed both before and independent from the self-defense privilege.[37] It has deep roots in the common law and in history: as set forth in Exodus 22:1, "If a thief break into a man's

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[35] Rollins, supra, at 383-384. See also Hale, *Pleas of the Crown*, 36. Rollins also observes that the right eventually included the killing of perpetrators of most forcible felonies, including a strange early exception–one attempting to murder. And Professor Perkins agrees that using deadly force against a murderous attack was justifiable homicide, disagreeing–and having the better of the argument–with Professor Beale, who took the view that even the wholly innocent victim of an assault murderous at the outset had to retreat unless the assault was accompanied by a demand for property. See Beale, "Retreat from a Murderous Assault," 16 Harv L Rev 567 (1903), discussed by Perkins, at 999-1000.

[36] 8 Mich at 178. See also *People v Cook*, 39 Mich 326 (1878): "It was argued that the law justifies homicide when committed in the defence of the chastity either of one's self or relation; that it is the duty of every one who sees a felony attempted by violence to prevent it if possible, and that life may be taken in so doing if necessary....The law is undoubtedly laid down in the authorities cited as claimed. But the felony in either case must be a forcible one." See also Clark and Marshall, *Crimes*, (Callaghan and Co: 1967) § 7.01, p.470-473.

[37] Green, supra, at 4.

house by night, and he be there slain the slayer shall not be guilty of manslaughter." One need not retreat if assaulted in his or her own dwelling, and may use all force necessary, including deadly force, to repel the assailant from the house, or to prevent its forcible invasion, and need not be in fear of death or great bodily harm in so doing.[38] Where the assault or invasion is felonious, the homicide is not merely excusable, as with *se defendendo*, but justifiable.[39] The principle extends to protecting the dwelling itself from destruction; deadly force may be employed to prevent the destruction of the dwelling by "fire, explosion or in some other manner."[40]

It is sometimes said that the privilege to use deadly force in defense of the habitation includes the curtilage,[41] but this is an exaggeration. Some commentators cite Blackstone in support of this claim, but point to his discussion of burglary.[42] But Blackstone did not include breaking into the curtilage as a burglary, stating instead that while structures removed in distance from the dwelling-house cannot be the subject of burglary, if the "barn, stable, or warehouse be parcel of the mansionhouse, though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all it's branches and appurtenants, *if within the curtilage*

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[38] Unlike self-defense, where, in Michigan, as in many jurisdictions, a co-occupant has no duty to retreat from an assault by a fellow occupant, there defense of habitation privilege has no place with co-occupants, for it presupposes an unlawful entry. Principles of self-defense alone apply in this situation. See *State v Hare*, 575 NW2d 828 (Minn. 1998).

[39] 8 Mich at 178.

[40] Perkins, at 1023.

[41] See e.g. Alsup, "The Right to Protect Property," 21 Envtl L 209 (1991).

[42] Alsup, at fn 67, citing IV Blackstone, at 224-226.

or homestall."[43] Included within the "mansionhouse"–for purposes of burglary–are *structures* "appurtenant" to the dwelling, if within the curtilage,[44] but the curtilage itself is not the subject of burglary, and so the claim that defense of habitation includes the curtilage is a confusion of structures within the curtilage with the curtilage itself. A breaking of the curtilage will not permit the use of deadly force in defense of habitation. For example, in one case an argument occurred between the defendant and his brother and two other individuals. The defendant went into his house and got his shotgun. When the two individuals attempted to come through the gate into the yard toward the defendant and his brother, who were on the porch, the defendant fired, killing one of the individuals and injuring the other. The defendant requested an instruction on defense of habitation, which was refused. The court observed that defendant was on the back porch when he fired the gun, and that the victims were at the most just inside the fence in the backyard. The court held the instruction properly denied, for it could find "no case in which the mere breaking of the curtilage is sufficient to support a defense of habitation."[45]

C. The Development of the Retreat/No Retreat Rules in the United States

At the common-law, then, in the "true" self-defense situation—a sudden encounter, a quarrel, fight, or brawl–one had a duty to retreat "to the wall," if he or she could do so in safety, before using deadly force, but retreat was not required further than the dwelling, nor if the affray began in the

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[43] IV Blackstone, at 225 (emphasis supplied).

[44] And Michigan law is to the same effect with regard to burglary. See *Pitcher v People*, 16 Mich 142 (1867), where Justice Cooley for the court held that under the common-law rule a certain barn within the curtilage was a part of the "dwelling-house" because a part of the "congregated buildings occupied and used by the family for domestic purposes," so that the accused was properly convicted of burglary for breaking into the structure.

[45] *State v Lawrence*, 569 SW2d 263 (Mo.App, 1978).

dwelling. One could stand his or her ground, however, in resistance to a violent or forcible felony, and use deadly force, even if retreat could be undertaken in safety. And one could use deadly force to protect his or her dwelling against violence or forcible invasion not only without a duty to retreat, but without fear of imminent death or great bodily harm. But the course of the law here did not run smooth in the developing United States, where two divergent views developed, and remain today: the "no retreat," or stand one's ground jurisdictions, which are described as the majority in this country, and the "retreat" or necessity jurisdictions, of which Michigan is one.

(1) <u>The development of a "no retreat" rule</u>: <u>culture, circumstance, and geography</u>

"I'll die before I'll run"[46]

The rejection of the common-law rule of retreat in situations of self-defense/*se defendendo* in favor of a "no retreat/stand one's ground" rule was most common in the south and southwest, and for three principal reasons: 1)the prevalence of firearms; 2)the lack of effective law enforcement; and 3)the conflation of resistance of a violent felony principles–where no retreat is required before deadly force may be used–with principles of self-defense, where retreat is required, save for the castle exception, before deadly force may be employed.

The West–where law enforcement was often scarce or non-existent, and guns prevalent—and the South, tended to view *any* retreat rule as either contrary to needs of safety as taught by experience, or contrary to common culture. As one commentator has put it, "[T]he Southern and Western portions of the country renounced the rule because a cowardly, 'unmanly' rule of retreat

[46] From a Western ballad.

contradicted the spirit of the frontier."[47] Beale referred to the "West and South," where "most of these authorities are found," as finding it "abhorrent...to require one who is assailed to seek dishonor in flight." These courts, in Beale's view, found their ideal "in the ethics of the duelist, the German officer, and the buccaneer,"[48] and he found a quotation from a Missouri case representative:

> The right to go where one will, without let or hindrance, despite of threats made, necessarily implies the right to stay where one will, without let or hindrance....It is true, human life is sacred, but so is human liberty....In other words, the wrongful and violent act of one man shall not abolish or even temporarily suspend the lawful and constitutional right of his neighbor....
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> We hold it a necessary self-defense to resist, resent, and prevent such humiliating indignity,-such a violation of the sacredness of one's person,-and that, if nature has not provided the means for such resistance, art may; in short, a weapon may be used to effect the unavoidable necessity.[49]

In the South the matter tended to be one of culture, where a "culture of honor" was the norm. Southern men believed that they were honorable, and that "the failure to respond to insult marked them as less than real men, branded them, in the most telling epithets of the time, as 'cowards' and

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[47] Wheatcroft, "Duty to Retreat for Cohabitants-In New Jersey, A Battered Spouse's Home is Not Her Castle," 30 Rutgers L J 539, 546 -547 (1999). See also Rosen, supra.

[48] Beale, supra, at 577.

[49] Beale, supra, quoting from *State v Bartlett*, 71 SW 148, 151. See also *New Jersey v Goldberg*, 79 A2d 702 (NJ, 1951) ("It is not astonishing to discover in the early decisions of the western and southwestern jurisdictions an ethical abhorrence of flight, regarding it as a spectacle of cowardice and disgrace," and *Covington v State*, 302 So 2d (Fla App, 1974) (referring to a peculiar southern quasi-self-defense doctrine, where a jury might acquit upon a showing that the victim "needed killing").

'liars.' A coward tolerated insult, a liar attacked honor unfairly. To call a southern man either one was to invite attack."[50] All the more so with any physical encounter.

In the developing West, lack of law enforcement, the proliferation of firearms, and cultural considerations combined to lead to a "stand one's ground" rule of self-defense.

> There were thousands of gunfighters and thousands of gunfights. The social institution of gunfighting was not at all restricted to the famous gunfighters but was all too often a feature of daily life in the West.[51]

The famous "walkdown" gunfights of television and movies were real. These "man to man" gunfights did not become common until some time after perfection of the repeating revolver in the 1840's, and were an outgrowth of the Southern institution of the duel. They received wide national attention after the showdown in Springfield , Missouri between Wild Bill Hickok and one Dave Tutt in 1865. Hickok prevailed,[52] Tutt's shot missing and Hickok's striking Tutt in the heart, leading to the arrest and trial of Hickok for manslaughter. Though instructed that Hickok was only justified if "he was anxious to avoid the fight, and used all reasonable means to do so," the jury acquitted on grounds of self-defense.[53] It was not long before the law caught up with culture and common experience–well-expressed in a line from a ballad of the time, "I'll die before I'll run"[54]–so that one

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[50] Cohen, "Meanings of Violence," 27 J Legal Stud 567, 569 (1998).

[51] Brown, *No Duty to Retreat: Violence and Values in American History and Society*, (University of Oklahoma Press: 1994), p.40.

[52] Only to be shot dead from behind in Deadwood, Dakota Territory, in 1876, while playing cards.

[53] Brown, at 52.

[54] "Wake up, wake up, darlin' Carrie!/And go get me my gun./I ain't no hand for trouble./But I'll die before I'll run." Quoted in Brown, p. 200, note 101.

was, in these areas of the country, permitted to stand his or her ground against any attack, to the point of using deadly force even if death or injury could have been avoided by retreat in safety.

(2) <u>The development of a "no retreat" rule</u>: <u>the cases</u>

"*A man is not born to run away.*"[55]
Justice Oliver Wendell Holmes (1921)

Perhaps the two leading early state cases, or at least the most cited, are *Erwin v State*[56] and *Runyan v State*.[57] In *Irwin* the deceased was the son-in-law of the defendant, the two living in houses a short distance apart on land owned by the defendant. They did not get along. Outside of the curtilage of both houses was a "corn-crib and shed" used for storing grain and farming implements. Son-in-law and father-in-law disputed over the possession of this building, where the defendant had stored farming tools, and the deceased threw the defendant's tools out of the shed, replacing them with his own, and securing them with chains and locks. The defendant broke the locks and returned his tools, leading to angry words between the two parties. The son-in-law advanced on his father-in-law with an axe on his shoulder, and the defendant, in the shed, warned him not to enter. When the deceased approached to the entrance of the shed, and likely within distance to strike a blow with the axe if he was so minded, the defendant shot him to death.

The instructions given on self-defense permitted the use of deadly force provided the defendant had used "all means in his power otherwise to save his own life....such as retreating as far as he can go...if it be in his power," and permitted the use of deadly force if the defendant "believed

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[55] Mark DeWolfe Howe, ed. *1 Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916-1935*, p.335 (Cambridge: Harvard University Press, 1953).

[56] *Irwin v State*, 29 Ohio St. 186 (1876).

[57] *Runyan v State*, 57 Ind 80 (1877).

honestly that he would be in equal danger by retreating." The Ohio Supreme Court found the instructions erroneous, and in so doing conflated the principles of *se defendendo* and resistance of a violence or forcible felony, quoting from Coke on both points as though they referred to the same principle:

> "...if A be assaulted by B, and they fight together, and before any mortal blow be given, A giveth back until he cometh to a hedge, wall, or other strait, beyond which he can not passe, and then, in his own defense and for safeguard of his own life, killeth the other; this is voluntary, and yet no felony....If A assault B so fiercely and violently and in such manner as if B should give back, he should be in danger of his life, he may, in this case, defende himself; and if, in that defense, he killeth A, it is se defendendo."

And on page 56, *speaking of the same subject*, he says:

> "Some, without giving back to a wall, etc., or other inevitable cause, as if a thief offer to rob or murder B either abroad or in his house, and thereupon assault him, and B defende himselfe without giving back, and in his defense killeth the thiefe, this is not felony; for a man shall never give way to a thief, etc., neither shall he forfeit anything."[58]

After surveying other authorities, the court concluded that "a true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm."[59] In so doing, the court applied the rule concerning resistance to a violent or forcible felony to the "chance-medley" or *se defendendo* situation, rejecting, at least implicitly, the common-law rule with regard to self-defense. Because Ohio rejected the retreat rule

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[58] *Irwin*, at 194-195.

[59] *Irwin*, at 199-200.

entirely, *Irwin* and those cases following it have little to teach regarding the reach or scope of the castle exception in retreat jurisdictions.

To much the same effect is the Indiana case of *Runyan*. No question of retreat and the dwelling was involved, as Runyan was in town when confronted. The jury was instructed that "if the person assailed can protect his life and his person by retreating, it is his duty to retreat....Do not understand me, gentlemen, to say, that retreat is always necessary, before the party assailed may take life in his defence. Retreat might be perilous or impossible, and might only to tend to increase the danger." Referring to the "general drift" of American authorities, the Indiana Supreme Court viewed the "tendency of the American mind" to be strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life...."[60] The court thus placed Indiana among those states endorsing the "new" and "modern" rule that a person, in any place he or she has a right to be, may stand their ground if assaulted, to the point of using deadly force to resist an assault. This blanket rejection of any retreat rule again teaches nothing to a retreat jurisdiction.

The United States Supreme Court placed federal cases within the "no duty to retreat" camp, although not without some inconsistency in the decisions. In 1895 the Court in *Beard v United States*[61] considered a manslaughter conviction occurring in Arkansas in Indian country. The defendant and three brothers became embroiled in a dispute regarding a cow. Beard had possession of the cow, and the brothers believed that one of them had a right to it. The brothers went onto Beard's land to take the cow, and argued with his wife. When Beard saw this, he approached from

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[60] *Runyan*, at 84.

[61] *Beard v United States*, 158 US 550, 15 S C5 962, 39 L Ed 962 (1895).

an adjoining field, carrying a shotgun, and ordered the brothers to leave. They refused, and one, in "an angry manner and in a brisk walk," and with his left hand in the pocket of his trousers, approached Beard. Beard ordered him to stop, but he did not, and when Beard asked what he intended to do, he answered "Damn you, I will show you" while making a movement to take his hand out of his pocket, as if to draw a pistol. Beard quickly struck him in the head with his gun, and the blow was fatal.

The trial judge instructed that Beard had a duty to retreat if he could in safety, and that the fact that a person is "standing upon his own premises away from his own dwelling-house does not take away from him the exercise of the duty of avoiding the danger if he can with a due regard to his own safety by getting away from there...."[62] The Court disagreed with the instruction, finding that there is no duty to retreat from a place where one, when assailed, "has a right to be." The Court cited *Erwin* with approval, as well as *Runyan*, again applying the no-retreat rule of the doctrine of resistance to a violent or forcible felony to the "chance-medley" or sudden quarrel or affray situation. The citations to *Irwin* and *Runyan* demonstrate the rejection of the retreat rule in favor of a "stand one's ground" rule.

Just one year later, however, doubt was cast on the question by *Allen v United States*.[63] There a retreat instruction was upheld, and *Beard* distinguished on the ground that Beard was assaulted on his own premises, even though not within the curtilage. But that the United States Supreme Court was rejecting the retreat rule in favor of a "no retreat/stand one's ground" rule was made clear in the

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[62] *Beard*, at 963-964.

[63] *Allen v United States*, 164 US 492, 17 S Ct 154, 41 L Ed 528 (1896).

opinion for the Court of Justice Holmes in *Brown v United States*.[64] There was, to put it mildly, bad blood between Brown and one James Hermes, as Hermes had previously attacked Brown with a knife, and made threats against him. Both men were working at the same excavation site, Brown supervising the project, and Brown had brought a pistol with him to work because of Hermes' threats. The two engaged in an argument over the work, and Hermes came toward Brown with a knife. Brown ran to his coat, which was twenty or twenty-five feat away, obtained his pistol, and stood his ground as Hermes attempted to stab him, firing four shots at Hermes and killing him.

The trial judge instructed that a party assaulted is always under the obligation to retreat (outside the dwelling) so long as he can do so without subjecting himself to the danger of death or great bodily harm. Holmes and the Court disagreed, and in a case not involving the premises of Brown in any respect. Rather, said the Court, "if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant *he may stand his ground* and that if he kills him he has not exceeded the bounds of lawful self-defense." The killing had taken place in Texas, a no-retreat jurisdiction as a matter of state law, and Holmes noted with approval that "the law of Texas very strongly adopts these views."[65] The result was a complete rejection of the rule of retreat, so that neither *Beard* nor *Brown* have anything to say to retreat jurisdictions.[66]

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[64] *Brown v United States*, 256 US 335, 41 S C5 501, 65 L Ed 961 (1921).

[65] *Brown*, at 343.

[66] Two justices dissented in *Brown*. It has been suggested that Holmes's views were colored by his Civil War experiences, where, of course, retreat is cowardly, and where Holmes fought in five of the greatest battles of the entire war, and was seriously wounded three times. Holmes wrote a letter to Harold Laski four days before the opinion was released, remarking that "I don't say all that I think in the opinion," adding favorably that in Texas it was "well settled" that a "man is not born to run away." Mark DeWolfe Howe, ed, *I Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916-1935*, p.335 (Cambridge:

(3) The adherence to a retreat rule

That a large number of jurisdictions conflated the principles of *se defendendo* and principles of resistance of a forcible or violent felony, for reasons of culture or experience (a lack of law enforcement and prevalence of firearms) or both did not mean that the entire United States rejected the common-law rule. A substantial number of jurisdictions maintain the common-law rule of retreat for self-defense–that deadly force may not be employed if it can safely be avoided by retreat "to the wall," with the castle exception for the dwelling.[67] Michigan is clearly a retreat-rule jurisdiction.[68] The question becomes the scope of the castle exception.

D. The "Dwelling" and the Scope of the Castle Exception

Some jurisdictions include the curtilage within the castle rule, but it is likely that they confuse, as do some commentators, both defense of habitation and burglary common-law rules that include certain *structures* that are within the curtilage within their scope.[69] Some commentators refer to those jurisdictions that include the curtilage as part of the dwelling for purposes of the castle rule as having "expanded" the rule in so holding.[70] And at least one case suggests that if the castle doctrine extends to the curtilage in some jurisdictions, "[I]t may be seriously doubted whether a

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Harvard University Press, 1953). See Brown, supra, at 34-37.

[67] See Perkins, supra, at 1009.

[68] See *Pond v People*, supra, and discussion, infra.

[69] See e.g. *People v Faulkner*, 1 V.I. 248 (Virgin Islands, 1929), citing *Pond* for the proposition that the "special privileges pertaining to a man in his own habitation" includes the "precincts of his dwelling," when *Pond* includes only *inhabited out-buildings* within the curtilage within the defense of habitation privilege. See discussion infra.

[70] See e.g. Lee, "The Act-Belief Distinct in Self-Defense Doctrine: A New Dual Requirement Theory of Justification," 2 Buff Crim L R 191, 202 (1998); Green, supra, at fn 39..

concept arising in the mediaeval land law furnishes an intelligent guide in determining whether the taking of a life is to be justified."[71] In the view of one scholar particularly learned in the field, Professor Perkins, the curtilage cases may or may not involve an expansion of the common-law doctrine–the scope of the privilege "might have been limited to the actual building. This is mere speculation."[72]

Given this lack of clarity, the purposes behind a retreat rule–Michigan being a retreat jurisdiction–and a "curtilage" exception, are instructive. As Chief Justice Corrigan pointed out in dissenting from the denial of leave in *People v Canales*,[73] in Michigan, "the sanctity of human life" has been firmly recognized as "the primary principle underlying the duty to retreat rule," for "human life is not to be lightly disregarded, and the law will not permit it to be destroyed unless upon urgent occasion."[74] On the other hand, "the law does not require a person to retreat from his home, abandoning it and perhaps his family to the mercy of an assailant."[75] The necessity principle undergirding the retreat rule, protecting human life–*and only where retreat is possible in safety*–requiring retreat "to the wall" before life may be taken, is not served by a curtilage rule, while the sanctity of the home *is* protected by a "structures" rule.

This is so because the curtilage known at the common-law, and the curtilage recognized today–largely for purposes of the Fourth Amendment–are not the same. At the time of the

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[71] *State v Bonano*, 284 A2d 345 (NY, 1971).

[72] Perkins, at 1010.

[73] *People v Canales*, supra.

[74] Quoting *Pond*.

[75] *Canales*, supra.

development of the principles of *se defendendo* the curtilage referred to the land and outbuildings immediately adjacent to a castle, that were in turn surrounded by a high stone wall.[76] The purpose of the wall was precisely for defense,[77] so that retreat inside the wall might be taken as either "retreat to the wall" or retreat to the dwelling–though again, even at the common-law this latter point is not ascertainable. But a curtilage in this sense is no longer what is meant when the term is employed modernly, for it is very rare today that the land associated with the domestic activities of the dwelling-house itself are encompassed by a substantial wall for purposes of defense. In many locations, neither the front nor the back "yards" are encompassed by any fence, and certainly fencing ordinarily not of the sort to serve as a wall encompassing the dwelling and any other "domestic buildings."

The Model Penal Code[78] provides that retreat is required before deadly force in self-defense may be employed, if retreat can be undertaken in safety, but that retreat is not required from the dwelling. The dwelling is defined in the MPC[79] as "any building or structure, though movable or temporary, or a portion thereof, that is for the time being the actor's home or place of lodging." The MPC, then, does not include any notion of "curtilage" within the no-retreat rule for dwellings. Jurisdictions employing a statutory definition of dwelling similar to that of MPC hold that the no-

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[76] *United States v McCaster*, 193 F3d 930, 935 (CA 8, 1999).

[77] See *Bare v Commonwealth*, 94 SE 168 (Va, 1917).

[78] MPC § 3.04.

[79] MPC § 3.11.

retreat rule is limited to structures.[80] This comports with modern property developments, and with the principle that necessity is the rule for the taking of life in *se defendendo* situations, with the understanding that retreat is never required unless it can be undertaken in safety.

E. Michigan Caselaw

(1) Pond v People: The Framework Supplied

Close attention must be paid to *Pond v People*, for *Pond* is not simply a self-defense case, or, perhaps better put, is not *only* a self-defense case, and is the source of all wisdom for further discussion and analysis. Pond was wholly innocent of any culpability before the shooting, with three individuals combining with "an expressed intention to do him personal violence."[81] After having been attacked by the three along with 15-20 associates at a neighbor's house, Pond escaped and made it home. Several unsuccessful assaults on Pond's home followed, as well as another threatening encounter. Later, the group again went to Pond's home to look for him, and his wife refused them admittance. They then went to an inhabited "net-house" where Pond's servants resided, forced entry, and attacked a servant, one Cull, and also began to destroy the net-house. Pond came to the door and yelled "who is tearing down my net-house?" hearing in response the voices of a woman and a child crying, and the woman's voice twice crying out "for God's sake!" Cull was heard "hallooing as if

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[80] See *State v Nupeiset*, 977 P2d 183 (Hawaii App, 1999); *State v Crutcher*, 713 A2d 40 (NY App D. 1998), *State v Crist*, 909 P2d 1341 (Wash App, 1996), *Commonwealth v Marcocelli*, 413 A2d 732 (Pa Superior, 1979)(defendant had duty to retreat from front lawn, if he could have done so in safety); *State v Menser*, 382 NW2d 18 (Neb, 1986) (duty to retreat from sidewalk in front of apartment).. The MPC also recognizes a "business-place" no-retreat rule, but as against outsiders, and not co-workers. MPC § 3.04(2)(b)(ii)(A).

[81] 8 Mich at 178-179.

he was in pain." Pond yelled "Leave, or I'll shoot." After a second warning, he fired, and one of the gang was found dead.[82]

Justice Campbell for the court[83] engaged in a scholarly review of the law of homicide, viewing it "necessary to determine under what circumstances homicide is excusable or justifiable." Though the common-law distinction between excusable and justifiable homicide was primarily in terms of penalty, and that itself ceased over time,[84] homicide *se defendendo* was regarded as a species of excusable and not justifiable homicide, explained Justice Campbell. Where arising in a "sudden affray" the slaying was only excusable if the slayer did all that was reasonably within his or her power to avoid the use of deadly force, including retreating where retreat was safe, until prevented "either by reason of some wall, ditch or other impediment, or as far as the fierceness of the assault will permit him," it being understood that a retreat of not even a step was required if retreat could not be taken without manifest danger of life or great bodily harm to a reasonable person under the circumstances.[85] The court, then, was embracing and not repudiating the common-law rule.

In addition to *se defendendo*, continued Justice Campbell, is the defense of the dwelling or habitation. One need not retreat if assaulted in his or her own dwelling, and may use all force necessary, including deadly force, to repel the assailant from the house, or to prevent its forcible

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[82] 8 Mich at 180.

[83] Containing two of what later came to be known as the "big four" of Michigan jurisprudence, Justices Campbell and Christiancy. Justices Cooley and Graves not yet having joined the court.

[84] See 8 Mich at 175. See 2 Pollock and Maitland, *The History of English Law* 478-484 (Legal Classics Edition, 1982).

[85] 8 Mich at 176; see 2 Bishop, *Criminal Law*, § 581, IV *Blackstone*, 184.

invasion. Where the assault or invasion is felonious, the homicide is not merely excusable, as with *se defendendo*, but justifiable.[86]

Further, continued Justice Campbell, at common law the use of deadly force to prevent or resist a violent felony was viewed as privileged; indeed, as the performance of a public duty, and though the question of personal danger will generally arise in this circumstance, as a matter of law it need not. The privilege allows the use of all force necessary to render resistance effectual, but extends only to a forcible or violent felony, and not to such crimes as "picking pockets" or "partaking of fraud rather than force."[87]

Demonstrating that no single doctrine was involved in the case, Pond's conviction was reversed by the court because it found "very strong circumstances to bring the act of Pond within *each* of the defenses we have referred to."[88] With regard to defense of habitation or dwelling, the question was "whether the net-house *was a dwelling* or *a part of the dwelling of Pond*,"[89] the court answering the in the affirmative.[90] The court so found because the structure was "a permanent

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[86] 8 Mich at 178. Indeed, as commentators have pointed out, the defense of habitation privilege is the most favored common-law privilege for use of deadly force, and has deep roots, being developed both prior to and independent from the privilege for self-defense. See Stuart P. Green, "Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles," 1999 U Ill L Rev 1, 4 (1999). See also Exodus 22:1: "If a thief break into a man's house by night, and he be there slain the slayer shall not be guilty of manslaughter."

[87] 8 Mich at 178. Although not involved here, Justice Campbell also observed–because the privilege could properly have been invoked by Pond–that private persons are privileged in using force to suppress a riot or resist rioters, even to the point of deadly force.

[88] 8 Mich at 178 (emphasis added).

[89] 8 Mich at 181 (emphasis added).

[90] The court could easily have resolved the case if the no-retreat rule applies to the curtilage, a point to which the People will return. See also *People v Coughlin*, 67 Mich 466

dormitory for (Pond's) servants"[91] within the curtilage of the residence. Thus, the rule in *Pond* is that the defense of habitation, which requires no retreat, includes *inhabited out-buildings*.[92] Pond was *also* privileged to use deadly force, continued the court, because the attack on the net-house "for the purpose of destroying it" was a "violent and forcible felony," allowing the use of deadly force.[93] Concerning self-defense the court found error in the instructions that suggested that required was "actual instead of apparent and reasonably founded causes of apprehension of injury."[94]

In sum, *Pond* recognized three separate and distinct common-law principles regarding the use of deadly force in excusable or justifiable homicide, and found error in the case as to all of them:

- *Se defendendo*, or self-defense: the instructions required an actual imminent threat of death or great bodily harm, rather than an honest and reasonable belief on the part of the defendant in this regard;
- *Defense of the habitation of dwelling*: the trial court failed to recognize that the "castle exception" applies not only to the dwelling, but all inhabited outbuildings within the curtilage; and

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(1887)(root-house part of the dwelling).

[91] 8 Mich at 181.

[92] No Michigan case extends the defense of habitation rule to the curtilage; if the rule reached the curtilage, discussion of the nature of the structure in *Pond* would have been unnecessary. See *People v Keuhn*, 93 Mich 619 (1892), where defendant fired from just outside his door, and the trial judge instructed that the use of deadly force was not permissible "except when he goes into the house and locks the door," and the court found the instruction erroneous because not allowing the use of deadly force if, at the time of the shooting, the defendant "honestly believed he was in imminent danger of great bodily harm, and that this could only be avoided by acting in defense of himself at once, and before retreating," with no suggestion that defendant had no duty to retreat because within the curtilage.

[93] 8 Mich at 181.

[94] 8 Mich at 181.

- *Resistance to or prevention of a forcible felony*: the instructions failed to recognize that deadly force was permissible to prevent the destruction of the "net-house."

(2) A Century and Two Score Years

Though *Pond* referred to separate and distinct common-law privileges regarding deadly force, the area has not been revisited in depth in over 140 years,[95] and in Michigan, as elsewhere, there has been a tendency to conflate them. Though the "no-retreat" rule of *Pond* with regard to inhabited out-buildings within the curtilage was a part of the defense of habitation privilege, it has been treated as a part of self-defense, and the no-retreat rule thus limited to the dwelling in Michigan, not extending to the curtilage. This has clearly been the law since 1974, when, in *People* v *Godsey*,[96] the court held that the "no duty to retreat from the dwelling" rule before using deadly force applicable in defense of habitation applies in self-defense situations and refers to the physical structure and not the curtilage or "lot." In *People* v *Harris*[97] the court further held, citing *Godsey*, that "[The common passageways of an apartment building in which defendant resides, or another apartment in the same building are not areas to which the no-retreat rule applies. This would be especially true when, as here, the person shot also had a right to use the common area or the other apartment. Compare the excellent opinion in *People* v. *Godsey*...."[98] These cases are fully consistent with the common-law

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[95] See opinion of Chief Justice Corrigan, dissenting from the denial of leave in *People* v *Canales*, 463 Mich 1002 (2001).

[96] *People* v *Godsey*, 54 Mich App 316 (1974).

[97] *People* v *Harris*, 56 Mich App 517 (1975).

[98] 56 Mich App at 529-530. Subsequently, the Court of Appeals cited *Godsey* approvingly in *People* v *Szymarek*, 57 Mich App 354 (1975), *People* v *Drake*, 142 Mich App 357 (1985); *People* v *Fisher*, 166 Mich App 699 (1988), and *People* v *Wytcherly*, 172 Mich App 213 (1988) (holding that " A defendant is excused from a duty to retreat only in inhabited physical

rule of necessity before deadly force may be employed in self-defense, and with the caste exception, where the authorities, such as *Pond* itself, repeatedly refer to the right not to flee "from" the dwelling or when assailed "in" the dwelling.

Defendant contends not so much that *Godsey* misreads *Pond*, but that instead it is incompatible with *People* v *Lilly*.[99] The facts of that case are critical. The defendant, a farmer, had discharged the deceased, a farmhand, for drunkenness and "being unsteady." A dispute over wages due at the time of termination arose. The two met in the city by happenstance, and the deceased, being drunk, threatened the life of the defendant. The deceased was a strong man, much more powerful than the defendant.[100] Given his threats the deceased was eventually placed in custody of another individual by the marshal, and the defendant hurried home, where he was building a new house within a few feet of the old one. Two workers were present.

The deceased, along with two others, who were also "a good deal in liquor," all went to the defendant's house to get the deceased's trunk. Defendant, the two workers, his wife, three children, and a niece were there. After obtaining the trunk the deceased advanced towards the defendant in the passage way between the old house and the new one, demanding his full pay, and threatening him with "extreme violence." The deceased struck the defendant, as the defendant stated that "he must take his hands off and not strike him again." A struggle occurred, and the defendant stabbed the

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structures within the curtilage of his home"). The court also so held in *People* v *Kulick*, 209 Mich App 258 (1995), which remains precedent on the point, as it was remanded by this court for reconsideration of a different issue.

[99] *People* v *Lilly*, 38 Mich 270 (1878).

[100] 38 Mich at 273.

deceased, who died from the wound.[101] The court found erroneous instructions which suggested that it was "incumbent upon (Lilly) to *fly from his habitation where his wife and children were*, in order to escape danger instead of resisting the aggressor."[102] The difficulty the court found with the charge did not have to do with retreat or non-retreat, but that it "conveyed the idea that if *help was within call* and that the defendant so believed, then his act was not lawful self-defense," where the court found the law to be instead that "no one when hotly assailed under circumstances indicating an intent to take life or do grievous bodily harm is bound to withhold measures proper in self-defense *in order to wait for foreign help*."[103] The case does not discuss the retreat rule at all, but is concerned that one who, attacked and under an honest and reasonable belief of imminent death or great bodily harm, does not have to "remain supine and shift this duty upon other private persons."[104] *Lilly* is not inconsistent, then, with *Godsey* or *Pond*, instead simply holding that one may use deadly force "to save his own life or to protect himself from danger of great bodily harm," and an instruction requiring an appeal to others to intervene is improper.

F. Conclusion

Some argue–as does defendant–that a retreat rule from the "curtilage" or yard to the structure–indeed any retreat rule–forces the accused to assume an unnecessary and unfair risk, especially today, where the common weapon is a firearm. And certainly that one cannot outrun a

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[101] 38 Mich at 274-275.

[102] 38 Mich at 276 (emphasis supplied; the trial court had instructed the jury that Lilly was required to have "avoided such combat *by all reasonable means* within his power").

[103] 38 Mich at 276 (emphasis added).

[104] 38 Mich at 276.

bullet is a factor juries are quite capable of considering when determining whether the defendant, under the circumstances, could have retreated in safety without an honest and reasonable fear of death or great bodily harm. As Professor Robinson has noted:

> ...proper application of the retreat rule never requires assailed parties to increase their own danger for the safety of an assailant. The rule has not been interpreted, either by statute or judicial opinion, to require retreat into self-destruction. Actors are generally required to retreat only when they know they can do so with complete safety. The rule is no less appropriate because situations requiring retreat or allowing safe retreat may now be less common because of the more common use of guns.[105]

After all, the jury is not instructed that the defendant had an absolute duty to retreat, but only that deadly force should not be employed unless necessary–unless retreat in complete safety is not possible, under the circumstances as they reasonably appeared to the accused at the time. The instructions given in the instant case fairly protect both interests:

> By law, a person must avoid using deadly force if he can safely do so. If the defendant could have safely retreated but did not do so, you can consider that fact along with all the other circumstances when you decide whether he went farther in protecting himself that he should have.
>
> However, if the defendant honestly and reasonably believed that it was immediately necessary to use deadly force to protect himself from an eminent (sic) threat of death or serious injury, the law does not require him to retreat. He may stand his ground and use the amount of force he believes necessary to protect himself.[106]

The present case is a classic *se defendendo* situation–a sudden quarrel or affray, among friends, having its beginnings in the yard of the defendant. Faithful explication of common-law

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[105] 2 Robinson, *Criminal Law Defenses* § 131(c), p. 80.

[106] T, IV, 71.

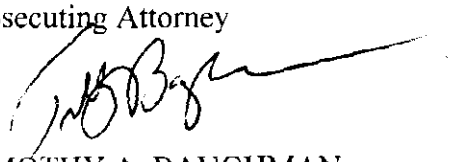
considerations–its respect for life, when the taking of life is avoidable, subject to the sanctity afforded by the dwelling–requires that the term "murder" as employed in the Michigan homicide statutes be understood as requiring that before deadly force can be employed, retreat to the structure is required, but if, and only if, that retreat can be undertaken in complete safety.

RELIEF

WHEREFORE, the People request that the convictions be affirmed..

Respectfully submitted,

MICHAEL E. DUGGAN
Prosecuting Attorney



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